



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**IN THE JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS APPLICATION NO. 629 OF 2016**

**IN THE MATTER OF AN APPLICATION BY NELSON HAVI FOR ORDERS OF  
CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE CIVIL PROCEDURE  
ACT, CAP. 21 OF THE LAWS OF KENYA, THE PUBLIC SERVICE COMMISSION ACT, CAP.  
185 OF THE LAWS OF KENYA AND THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF  
2015**

**AND**

**IN THE MATTER OF NELSON HAVI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**PUBLIC SERVICE COMMISSION.....RESPONDENT**

**AND**

**KERIAKO TOBIKO.....INTERESTED PARTY**

**EX PARTE: NELSON HAVI**

**RULING**

1. By a Motion on Notice dated 13<sup>th</sup> April, 2017, the ex parte applicant herein, These proceedings are the subject of the Notice of Motion dated 13<sup>th</sup> July, 2017 by which the ex parte applicant herein, **Nelson Havi**, seeks the following orders:

1) An Order be and is hereby made that the Notice of Motion herein dated 20<sup>th</sup> December, 2016 by the Ex-Parte Applicant raises substantial questions of law under Clauses (3) (b) and

**(d) of Article 165 of The Constitution.**

2) The Notice of Motion herein dated 20<sup>th</sup> December, 2016 by the Ex-Parte Applicant be and is hereby referred to the Chief Justice for the constitution of an uneven number of Judges, being not less than three to hear it.

3) The costs of this Application be provided for.

2. The application is based on the following grounds:

1) The Notice of Motion herein dated 20<sup>th</sup> December, 2016 by the Ex-Parte Applicant seeks to quash the Respondent's decision made on 21<sup>st</sup> July, 2016, dismissing the Ex-Parte Applicant's Petition dated 5<sup>th</sup> April, 2016, seeking the removal of the Interested Party from office and to compel the Respondent to reconsider the Petition in accordance with the guidelines set out in The Constitution of Kenya, The Fair Administration Action Act, No. 4 of the 2015 and the Rules of National Justice.

2) The Notice of Motion dated 20<sup>th</sup> December, 2016 raises substantial questions of law under Clauses (3) (b) and (d) of Article 165 of The Constitution of Kenya, to warrant a hearing by an uneven number of Judges, being not less than three.

3) The office of Director of Public Prosecutions ("DPP") currently occupied by the Interested Party ("IP") is a constitutional office established under Article 157 of The Constitution of Kenya.

4) The DPP is nominated and, with the approval of the National Assembly, appointed by the President, on qualifications similar to those for the appointment of Judges of the High Court.

5) The DPP may be removed from office under Article 158 of The Constitution of Kenya, only on the recommendation by the Respondent to the President, for the formation of a Tribunal appointed by the President and upon a finding by the Tribunal recommending removal.

6) Any dispute in respect to the suitability of the IP for appointment as well as removal from the office of the DPP relates to the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the interpretation of The Constitution of Kenya, a matter that is within the jurisdiction of the High Court under Article 165 (b) and (d) of The Constitution of Kenya.

7) The High Court sitting as a single Judge or an uneven number of Judges, not being less than three, appointed by the Chief Justice, has supervisory jurisdiction over the Respondent's authority and power relating to the decision on the consideration of the Ex-Parte Applicant's Petition for the removal of the IP as the DPP made by the Respondent on 21<sup>st</sup> July, 2016.

8) The IP was appointed as the DPP on the backdrop of a division by the National Assembly, with serious deferred issues on his suitability to serve as the DPP.

9) The IP was appointed the DPP during the pendency of Petition No. 101 of 2011 challenging his suitability, which Petition was dismissed on 25<sup>th</sup> May, 2012 by a bench of three Judges.

10) The complaint in respect to the IP's non-compliance with Chapter Six of The Constitution of Kenya, gross misconduct or misbehaviour in the handling of the Malili Ranch Limited matter was dismissed by the Respondent substantially in reliance upon the decision made in Misc. Civil Application No. JR. 424 of 2014, John Nduya Muthama –vs- Director of Public Prosecutions & 4 others (2015) eKLR on 3<sup>rd</sup> November, 2015 by Justice G.V. Odunga.

11) In his decision aforesaid, Justice G.V. Odunga dismissed the challenge to the IP's appointment of Paul Kibugi Muite to prosecute the suspects, holding in part as follows:-

a. "Accordingly, I do not agree with the applicant that the DPP had no power to appoint the 2<sup>nd</sup> Respondent as a prosecutor. The issue whether or not the 2<sup>nd</sup> Respondent's integrity justifies his appointment as such prosecutor is another matter altogether...

b. In my view, where the DPP is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressurised to go through the motions of a trial, the Court will not hesitate to terminate the proceedings as in such circumstances, the powers being exercised by the 1st Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion."

12) A different outcome was reached in respect to the Malili Ranch Limited matter in Misc. Civil Application No. 192 of 2016, Bitange Ndemo –vs- Director of Public Prosecutions & 4 others (2016) eKLR on 5<sup>th</sup> October, 2016 by Justice R. E. Aburili, who held on the issue of appointment of Paul Kibugi Muite as Prosecutor that:-

a. "What is strikingly strange about the exercise of these powers of the DPP by Senior Counsel Paul Muite in an "*independent manner*" is that the DPP enlisted the advice of Senior Counsel Paul Muite who even proceeded to draft charges on behalf of the DPP and he appeared in court on behalf of the DPP to prosecute the applicant and others right from the time of plea taking until when questions were raised as to whether Senior Counsel PK Muite was a gazetted prosecutor for purposes of that prosecution, is when Mr Muite, Senior Counsel, chickened out of those criminal proceedings, and yet nothing has been said about his role in the matter by the respondents.

b. In my humble view, the DPP did not act independently in that he accepted to be directed by Mr Paul Muite Senior Counsel who was not even an investigating officer in the matter, in deciding who to charge and who not to charge and with which offences, even when the investigations that would determine the actual charges were apparently still being undertaken by the Director of Criminal Investigations.

c. This court reads mischief in the advisory given by Mr Paul Muite Senior Counsel in that although he found that there was incriminating evidence against some suspects, like Mr Eric Mutua and others, his reasoning for excluding those other suspects from prosecution is not only irrational but without foundation and although this court shall not make any adverse orders against those individuals, no doubt the advisory by Senior Counsel Mr. Paul K. Muite was couched in a manner that suggests monkey business and guided by extraneous matters. I find that the decision by Paul Muite Senior Counsel, (which decision was adopted by the DPP without any question) to charge the applicant herein to the exclusion of self incriminated suspects like Mr Eric Mutua was arrived at in an arbitrary, skewed, discriminatory and selective manner. That is not acceptable. It amounts to abuse of legal process and abuse of power to prosecute."

13) A decision deprecating the conduct of the IP and Paul Kibugi Muite in the Malili Ranch Limited matter was made in Misc. Civil Application No. 40 of 2016, Republic –vs- Director of Public Prosecutions & 4 others (UR) on 28<sup>th</sup> February, 2017 by Justice H. I. Ong'udi, the Court holding on the appointment of Paul Kibugi Muite as Prosecutor, as follows:-

"All the above goes to show a sinister motive and ill will behind the arraignment of the Applicant in Court to face criminal charges. The conduct of the 1<sup>st</sup> Respondent in the matter relating to the Applicant leaves a lot of gaping holes. Firstly, he reviewed his own decision without giving the applicant an opportunity to make a comment on the

**new evidence... Secondly, potential suspects were turned into prosecution witnesses in a very selective manner. Thirdly, was Senior Counsel Muite's appointment and gazettelement as a Special prosecutor? This was done despite the fact that Senior Counsel had reviewed and investigated the case, made recommendations, drafted the charges, registered the charges and issued summons in the case. This process alone is very telling.**

**14. The substantial question to be determined in respect to the Respondent's consideration or failure of consideration of the complaint levelled against the IP in respect to the Malili Ranch Limited matter is as follows:-**

**“Whether the Respondent could withhold the exercise of the constitutional authority and power to consider the removal of the IP from office solely on the basis of the decision made in Republic -vs- Director of Public Prosecutions & 4 others Ex-Parte – Senator John Nduya Muthama (2015) eKLR and an alleged pending appeal on the same?”**

**15) A further substantial question to be determined in respect to the Notice of Motion dated 20<sup>th</sup> December, 2016 in so far as it relates to the IP's handling of the Malili Ranch Limited matter is:-**

**“Whether the Respondent should re-consider the Petition for the removal of the IP as the DPP, in view of the decisions made in Bitange Ndemo -vs- Director of Public Prosecutions & 4 others (2016) eKLR and Republic -vs- Director of Public Prosecution & 3 others Ex-Parte Zablon Agwata Mabea (UR)?”**

**16) As regards the complaint of non-compliance with Chapter Six of The Constitution of Kenya, gross misconduct or misbehavior in respect to the IP's handling of the Purple Saturn Properties Limited matter, the substantial question to be determined is as follows:-**

**“Whether the Respondent could withhold its constitutional authority and power to consider a Petition for the removal of the IP as the DPP, on the ground that the matter complained of was alleged to be still under active investigations and consideration.”**

**17) The three questions set out hereinabove, amongst other matters raised in the Notice of Motion dated 20<sup>th</sup> December, 2016 are substantial, novel and require consideration by an uneven number of Judges, being not less than three to be appointed by the Chief Justice.**

**18) It is in the interest of justice that the Orders sought herein should be granted.**

3. These grounds were expounded by the ex parte applicant in his supporting affidavit.

### **Respondent's Case**

4. The application was opposed by the Respondent vide the following grounds of opposition:

**1. That the application seeking for an order to constitute an uneven number of judges is without merit for reasons that; it does not meet the threshold as stipulated under Article 165(4) of the Constitution.**

**2. That the judicial review application does not warrant the empanelling of an uneven bench as it does not raise a substantial issue of;**

**i. jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened; Article 165(3)(b) of the Constitution.**

**ii. Jurisdiction to hear any question respecting the interpretation of the Constitution as envisaged under Article 165(3) (d) of the constitution.**

**3. That notwithstanding the provisions of Article 165(4) the decision of a three judge bench is no superior to that of a single judge exercising the same jurisdiction.**

### **Interested Party's Case**

5. The application was opposed by the interested party.

6. According to the interested party, under Article 158 of the Constitution of Kenya, 2010, the Public Service Commission (hereinafter "the Respondent") is mandated to receive and consider petitions for the removal of the DPP from office and if satisfied that if any such petition discloses the existence of a ground for removal of the DPP from office as set out under Article 158 (1) of the Constitution of Kenya, 2010 and Section 9 of the **ODPP Act** refer the same to the President to appoint a Tribunal.

7. In these proceedings, it was averred that the Ex parte Applicant seeks that the respondent's decision dismissing his petition dated 5/4/2016, for the interested party's removal as DPP be quashed by an order of Certiorari and further that the respondent be compelled by an order of Mandamus to re-consider the said petition. It was however contended that the respondent's decision dismissing the Ex parte Applicant's petition for the interested party's removal as DPP as well as the grounds and reasons therefore was contained in its letter dated 21/7/2016 addressed to both the Ex parte Applicant and the interested party.

8. To the interested party, the purview of these judicial review proceedings is clearly delineated in law and in considering the same, the honourable court would be bound to only concern itself with the process leading to the respondent's decision complained of but not the merits of the decision by the respondent.

9. In the interested party's view, the three questions that the Ex parte Applicant has framed claiming that they warrant the court to certify the matter as raising substantial questions of law to be heard by an uneven number of not less than three judges do not in any way relate to the process leading to the respondent's impugned decision but rather directly relate to the merits of the substantive decision that is under challenge and their consideration and determination would take the matter outside the realm of judicial review jurisdiction.

10. In any case, the first question framed by the Ex parte Applicant proceeds on the false and/or mistaken premise that the respondent had withheld the exercise of its constitutional authority and power to consider a petition for removal of DPP because of the decision in **Republic -vs- DPP & 4 Others Ex parte - Senator John Nduya Muthama.** Contrary to what the Ex parte Applicant states, the interested party averred, the Respondent in exercise of its constitutional mandate under Article 158 of the Constitution of Kenya, 2010 received and considered the petition for removal of the DPP and reached the decision that in relation to the allegations touching on Malili Ranch Limited matter, similar allegations had been made in the High Court in **Republic -vs- DPP & 4 Others Ex parte - Senator John Nduya Muthama** and a decision thereon rendered which is subject of a pending appeal in the Court of Appeal. The respondent therefore reached the decision that these allegations did not disclose the existence of any grounds under the law for removal of the DPP and cannot in the circumstances be said to have withheld the exercise of its constitutional authority and power.

11. It was contended that the second question framed by the Ex parte Applicant, if entertained and considered, would in effect amount to a consideration of the merits of the respondent's decision now under challenge in these proceedings against the High Court's decisions in **Republic -vs- DPP & 4 Others Ex parte - Senator John Nduya Muthama, Bitange Ndemo -v- DPP & 4 Others and Republic -vs DPP & 3 Others Ex parte Zablon Agwata Mabea.** It was the interested party's case that the judicial review application herein is not an appeal to determine which of the of the 3 Judgments in respects of the Malili Ranch cases is the correct one as that is the province of the Court of Appeal. A three judge bench, if it were to be constituted, in respected of this matter cannot be required to determine

which of the 3 is the correct decision. To him, such an approach would take the matter outside the realm of judicial jurisdiction.

12. As regards the third question framed by the Ex parte Applicant and contrary to the false impression created thereby, it was averred that the Respondent in exercise of its constitutional mandate under Article 158 of the Constitution of Kenya, 2010 received and considered the petition for removal of the DPP and reached the decision that in relation to the allegations touching on Purple Saturn Properties Limited, the alleged failure to act did not disclose the existence of any ground under the law for removal of the DPP as the matter complained of were still under investigations by the Multi Agency Team (MAT). In the circumstances, the respondent cannot be said to have withheld the exercise of its constitutional authority and power, yet the respondent found that the investigations on Purple Saturn Properties has not been concluded and that the matter is still under active investigations and consideration.

13. The interested party averred that he was aware that there is a limited number of judges to adjudicate on disputes for the benefit of the Kenyan public at large. The management of the limited judicial resources dictates that it is only in exceptional circumstances and when it is absolutely necessary that a bench of more than one judge will be constituted to determine a dispute. However in this case, there are no exceptional circumstances and it isn't absolutely necessary to constitute a bench of more than one judge. It is against the public interest to deploy more than one judge to adjudicate on run off the mill dispute and deny other litigants and potential litigants the personnel to expeditiously determine their disputes.

14. The interested party contended that each and every judge of the specialized judicial review division is competent and capable of resolving the dispute. The numerical strength of a bench does not alter the legal and factual position that any decision rendered will remain the decision of the High Court notwithstanding the number of judges determining the disputes.

15. It was the interested party's position that all the questions posed by the Applicant in the main motion revolve around settled legal principles in judicial review and that any of the judges in the specialized judicial review division are capable of applying those settled principles to the facts of this case. According to him the questions raised in these proceedings do not transcend the interested of the litigants in the proceedings, so as to acquire the character of general public importance justifying deployment of more than one judge. The interested party averred that he was not aware of any constitutional or statutory provisions permitting the assembling of more than one judge to hear and determine judicial review proceedings. To him, the governing case requires the applicant to discharge the burden of convincing the court that it is justifiable for the court to exercise its discretion and assemble more than one judge to determine a dispute which burden the applicant has not discharged.

16. At any rate, it was his belief that the Application does not meet the threshold under Article 165(4) of the Constitution of Kenya, 2010 because;

- i. None of the three questions framed by the Ex parte Applicant concern a determination of an issue relating to whether a right or fundamental freedom has been denied, violated, infringed or threatened or the interpretation of the constitution.
- ii. The three questions framed by the Ex parte Applicant do not raise any novel point of law; and
- iii. As the proceedings herein have been brought way of judicial review and therefore challenge ought on the decision making process by the respondent in arriving at the impugned decision, the matter is straight forward and does not present any complexity in law or fact and/or raise any fundamental or monumental issue of the interpretation of the constitution.

17. The interested party contended that as this matter was commenced under a certificate or urgency and is ripe for hearing, it is in the best interest of all the parties herein that the same be disposed off, and the present application is a delaying tactic by the ex parte applicant. He therefore urged the Court to dismiss the application with costs.

## **Determination**

18. I have considered the submissions made by counsel for the parties herein. The general rule in these sort of matters was laid down by the Court of Appeal in **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** in which the Court held that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. Therefore the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. However like all discretion, that power must be exercised judicially and judiciously and not on caprice, whim, likes or dislikes.

19. As has been held by this Court before, the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. Despite appreciably great strides made in the expansion of the Judiciary in the recent past, there is definitely much more to be done with respect to achieving the spirit of Article 48 of the Constitution on access to justice. Accordingly, this Country still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling of such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country. I with respect associate myself with the position adopted by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** where he held that:

**“the meaning of ‘substantial question’ must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.”**

20. I also defer to the decision in **Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011** where this Court held:

**“It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of *stare decisis* whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same.”**

21. Article 165 of the Constitution provides as follows:

***(1) There is established the High Court, which—***

***(a) shall consist of the number of judges prescribed by an Act of Parliament; and***

***(b) shall be organised and administered in the manner prescribed by an Act of Parliament.***

***(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.***

***(3) Subject to clause (5), the High Court shall have—***

*(a) unlimited original jurisdiction in criminal and civil matters;*

*(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*

*(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*

*(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

*(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

*(iv) a question relating to conflict of laws under Article 191; and*

*(e) any other jurisdiction, original or appellate, conferred on it by legislation.*

*(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.*

22. Therefore the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law in the following instances:

**1. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or**

**2. That it involves a question respecting the interpretation of the Constitution and under this is included (i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.**

23. In my view in considering such questions, it does not matter whether the matter is brought by way of judicial review application or as a constitutional petition as long as the cause satisfies the constitutional threshold.

24. Since the determination of such issue is a judicial one, the Court is obliged either on its own motion or on an application of the parties to the cause to identify the issues which in its view raise substantial questions of law. Therefore the mere fact that parties are of the view that the matter falls under Article 165(4) does not necessarily bind the Court in issuing the said certification.

25. According to the above provision, it does not suffice that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. Similarly the mere fact that a substantial question of law is disclosed does not suffice unless the issue also arises as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution.

26. As to whether this is the case is a matter for judicial determination based on the facts of the particular case and the law involved. This was appreciated in Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011 where it was noted that:

**“The Constitution of Kenya does not define, ‘substantial question of law.’ It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter.”**

27. In that case the Court proceeded to note that the promulgation of the Constitution of Kenya, 2010 brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. This Constitution has been recognised by the Supreme Court as being transformative in nature. It has expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue in Chapter Six and Chapter Eleven dealing with Devolved Government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than one judge, other judicial business would definitely come to a stand still and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the *Civil Procedure Act* would never be realised.

28. In Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314, it was held that:

**“a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”**

29. In Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179 it was held that:

**"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*."**

30. The Indian tests for determining whether a matter raises substantial question of law are therefore: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

31. To my mind the above considerations offer proper guidelines and an insight in determining whether or not a matter raises “a substantial question of law” for the purposes of Article 165(4) of the Constitution.

32. The Court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the petition and the level of public interest generated by the petition.

33. These however are mere examples since the Article employs the word “includes”. Accordingly, the list cannot be exhaustive and the Courts are at liberty to expand the grounds as occasions demand. Even before the promulgation of the current Constitution, it was appreciated in **Kibunja vs. Attorney General & 12 Others (No. 2) [2002] 2 KLR 6** that:

**“in exercising that discretion, several factors have to be taken into account including, but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them, if any.”**

34. In my view, the Court must adopt a holistic approach to the matter at hand. In other words, the mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article 165(4) of the Constitution.

35. In this case, the application before me is not seeking a determination as to the suitability of the interested party to hold office. That is a matter that can only be determined by the Respondent while exercising its investigatory powers and the Tribunal that may be constituted to look into the conduct of the interested party if that stage will ever be reached.

36. The thrust of the application before this Court is whether taking into account the circumstances of the case, the Respondent properly exercised its mandate. That is a matter which does not ordinarily pose any challenge in its determination considering the robust jurisprudence developed by the Court in that area.

37. In my view, the issues raised herein are matters which this Court routinely deals with and it does not require an enlarged bench for this Court to determine the propriety of the exercise of the Respondent’s constitutional or statutory powers.

38. Even if the issues herein were novel, with due respect novelty alone does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment. In my view the mere fact that a matter is novel or jurisprudentially challenging does not *ipso facto* elevate it to a substantial question of law for the purposes of Article 165(4) of the Constitution. With due respect any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes to another organ.

39. I associate myself with the holding by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229** that:

**“A court of law would not be entitled in our view to abdicate its cardinal role of making a determination...No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or**

adversely affect the entire system of the administration of justice...We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:

**“It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge’s time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges’ time as is necessary for the proper determination of the relevant issues.”**

At page 493 of the same case *Lord Templeman* delivered himself thus:

**...“...The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge.”**

40. This was the position adopted by Nyamu, J in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** when he expressed himself as follows:

**“In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time.”**

41. In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying the Constitution. Whereas the Constitution permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly.

42. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or *stare decisis* principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges.

43. However there may exist circumstances which may warrant that a matter be dealt with by an enlarged bench. Whereas the mere fact that there is no uniformity of thought by the High Court does not necessarily justify the empanelling of an enlarged bench taking into account that the precedential effect of both decisions are at par, where there seems to be conflicts that may be a reason to certify such a matter as fit for determination by an enlarged bench.

44. In this case three judges of the High Court, including myself have dealt with the prosecutorial powers of the interested parties in respect of the Malili Ranch saga. That saga seems to have found its way into these proceedings.

45. While I do not hold that in such circumstances, an enlarged panel must be constituted, in the unique circumstances of this case, it is my view that the matter ought to be so certified.

46. In the circumstances, I hereby certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution.

47. Accordingly let this matter be referred to the Hon. The Chief Justice for the said purpose. Further proceedings will be undertaken before the said bench as empanelled and since I have dealt with the Malili

Ranch Saga and the powers of the interested party in respect to the prosecutions thereto, let the said bench exclude myself.

48. The costs will be in the cause.

49. It is so ordered

**Dated at Nairobi this 22<sup>nd</sup> day of September, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Aisha Namwali for the applicant**

**Miss Chimau for the Respondent**

**Mr Sankale for the interested party**

**CA Ooko**